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In the Supreme Court of the United States

OCTOBER TERM, 1978

HARREL LLOYD ROBINSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Border Patrol checkpoint where he was stopped for a routine inquiry regarding citizenship was not a fixed checkpoint and accordingly that the evidence subsequently seized from his automobile should have been suppressed.

1. Following a jury-waived trial[1] in the United States District Court for the Southern District of Texas, petitioner was convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Pet. App. A-48). He was sentenced to five years' imprisonment to be followed by a special parole term of two years (Pet. App. A-37).

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[1]The only witness who testified at trial was a Border Patrol agent. A transcript of his testimony is set out at Pet. App. A-16 to A-34. The remainder of the facts were stipulated (see Pet. App. A-15); the stipulation is reprinted at Pet. App. A-39 to A-41.

The undisputed evidence shows that at approximately 8:45 p.m. on March 19, 1977, petitioner's car was stopped at the Border Patrol checkpoint at La Gloria, Texas (Pet. App. A-17 to A-18, A-39 to A-40). When a Border Patrol agent approached the vehicle to conduct an immigration check, the agent detected a strong odor of marijuana (Pet. App. A-17 to A-18, A-40). He then asked petitioner to open the trunk of the car (Pet. App. A-18, A-40). Petitioner opened the trunk only part of the way, but the agent, shining a flashlight, saw what appeared to be marijuana, asked petitioner to open the trunk completely, and found 235 pounds of marijuana (Pet. App. A-18, A-40).

2. As described by the Fifth Circuit in an earlier case, "[t]he La Gloria checkpoint lies at the confluence of a number of established roads leading away from a sparsely populated segment of the border. La Gloria's location [approximately 42 miles from the border] is such that it is the first point at which international traffic from areas of significant uncontrolled access receives scrutiny." *United States* v. *Alvarez-Gonzalez*, 561 F. 2d 620, 624 (C.A. 5) (footnote omitted). Although this checkpoint has no permanent buildings, it has permanent road signs, flood lights, a light pole, and a paved apron for secondary inspections (Pet. App. A-22, A-26 to A-28, A-31 to A-32). See *United States* v. *Alvarez-Gonzalez*, *supra*, 561 F. 2d at 622.

In *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 566, this Court held that "stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant." Petitioner contends, however (Pet. 2), that the stop of his vehicle occurred at "a non-existent immigration checkpoint." This factual determination was resolved against him by both lower courts and does not

warrant further review. See *Berenyi* v. *District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635-636. Moreover, as noted above, the findings of the courts below are amply supported by the record.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1978.

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[2]Petitioner does not contest the court of appeals' holding (Pet. App. A-3) that "[t]he odor of marijuana perceived by the officer during [petitioner's] stop furnished probable cause for further investigation." See *United States* v. *Woody*, 567 F. 2d 1353, 1357 (C.A. 5); *United States* v. *Arrasmith*, 557 F. 2d 1093, 1094 (C.A. 5); *United States* v. *Diaz*, 541 F. 2d 1165, 1166 (C.A. 5).

Alternatively, as the court of appeals held (Pet. App. A-3), since the La Gloria checkpoint is "the functional equivalent of the border" (see *United States* v. *Alvarez-Gonzalez*, *supra*, 561 F. 2d at 626), the search here was valid even in the absence of probable cause. See *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272-273.

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